STATE OF MICHIGAN

COURT OF APPEALS

DANIEL M. HONIGMAN,

Plaintiff-Appellee,

v

COMERICA BANK,

Defendant-Appellant,

and

WILMA BROWN and GRANT A. FRILEY, III,

Defendants.

UNPUBLISHED
January 31, 2003

No. 227325
Oakland Circuit Court
LC No. 95-495650-CZ

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant Comerica Bank[1] appeals as of right from a judgment in favor of plaintiff entered after a jury verdict. We affirm.

This case arises from circumstances involving the embezzlement of money from businesses. Plaintiff Daniel M. Honigman was an approximately 94% shareholder of Van Dresser Corporation, which had several subsidiaries, including Renaissance Manufacturing Company (Renaissance) and Van Dresser Corporation Westland (Westland), and also was the guarantor of certain loans to these companies. However, plaintiff owned no personal shares in Renaissance or Westland; his ownership in those companies was by way of his ownership in Van Dresser. In approximately October 1978, plaintiff hired his friend, defendant Grant A. Friley, III, to be president of Renaissance. When Renaissance went out of business, plaintiff transferred Friley to a manager position at Westland.

In July 1991, Van Dresser and some of its subsidiaries, including Renaissance and Westland, filed petitions for reorganization under Chapter 11 of the Bankruptcy Code in the

[1] Because Comerica Bank is the only appellant, it will hereinafter be referred to as defendant in the singular or as Comerica.

United States District Court for the Eastern District of Michigan. Eventually, the Chapter 11 proceedings were converted to Chapter 7 proceedings. At some point during the bankruptcy dealings, the bankruptcy trustees discovered that Friley had embezzled funds from Renaissance and Westland in an amount that, according to plaintiff's complaint, exceeded $2,746,511. Friley perpetrated the embezzlement through creating dummy companies, including City Trucking Company (a/k/a City Trucking and Disposal or City Disposal), Motor City Maintenance, and Republic Investigations, and depositing checks issued to pay phony invoices into bank accounts established for the dummy companies at defendant.

Specifically, between June 30, 1987, and February 14, 1992, Friley deposited a total of approximately $2,746,511 in these accounts from checks issued by Renaissance and Westland to the companies that Friley had created. Friley's scheme consisted of intercepting invoices, marking them up, submitting them for payment under the names of his created companies, receiving payment from Renaissance and Westland, depositing the payments in the Comerica accounts, and then paying the lower amounts of the real invoices and "pocketing" the difference. During that time, defendant Wilma Brown was an assistant manager of the Woodward-Milwaukee branch of defendant Comerica, where the checks were deposited. The business address for the City Trucking account was Brown's personal residence.

The bankruptcy trustees filed a complaint against Comerica, Brown, and Friley in the United States Bankruptcy Court for the Eastern District of Michigan, seeking to recover damages that the bankruptcy estates suffered as a result of defendants' wrongful actions. On April 18, 1995, plaintiff filed a complaint in the Oakland Circuit Court against Comerica, Brown and Friley, alleging conversion by Friley and Brown, aiding and abetting conversion by Comerica and Brown, breach of fiduciary duty by Friley, aiding and abetting breach of fiduciary duty by Comerica and Brown, civil conspiracy of all defendants, and negligence of Comerica. On May 19, 1995, Comerica removed the action to the United States Bankruptcy Court, Eastern District of Michigan, Southern Division. An order filed May 22, 1995, closed the circuit court case for administrative purposes without prejudice and indicated that it may be reopened on motion of any party when the bankruptcy stay has been removed.

Bankruptcy proceedings ensued. On October 27, 1997, the United States Sixth Circuit Court of Appeals issued an opinion, *In re Van Dresser Corp*, 128 F3d 945 (CA 6, 1997), affirming in part and reversing in part the United States District Court's order affirming the bankruptcy court's order dismissing plaintiff's state law causes of action against Comerica, Friley and Brown. *Van Dresser, supra* at 946. The Sixth Circuit determined that

> [b]ecause Honigman's claim to recover a portion of the $2.7 million [that defendants allegedly wrongfully took from Van Dresser subsidiaries] is the exclusive property of the Van Dresser bankrupt estate, the district court's judgment must be affirmed in that regard. However, the plaintiff may have a totally independent cause of action against the defendants for his costs in defending the suit to enforce his guarantees. Thus, the district court's order must be reversed in part. [*Van Dresser, supra* at 946.]

The Sixth Circuit reiterated:

> [D]espite the fact that Honigman cannot recover the $1,125,000 he was required to pay to various financial institutions, his costs in defending those actions *may* be reimbursable. That is, the estates presumably did not have to defend the collection actions against Honigman, and in any case they could not bring claims for Honigman's own costs and attorney fees. Thus, Honigman may proceed in state court, and if Michigan law allows him—and only him—to recover for the costs of defending the collection actions, such claims would not be property of the bankruptcy estates. [*Van Dresser, supra* at 949; emphasis in original.]

The Sixth Circuit further determined that because plaintiff's claims for costs and attorney fees arise solely under state law and do not involve the debtors' estates, they should be remanded to state court for determination. *Id.*

In June 1998, pursuant to stipulation, the United States District Court remanded the proceedings back to the Oakland Circuit Court. In August 1998, plaintiff moved in the circuit court to reopen the case because the bankruptcy stay had been removed and the matter reopened, and the circuit court ordered the case reopened. On October 6, 1999, Comerica moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), which the trial court later denied. A jury trial commenced on November 15, 1999, and the jury rendered its verdict on November 23, 1999. The jury found in favor of plaintiff with respect to each defendant and found plaintiff's total damages (attorney fees) to be $100,000. Thereafter, the trial court entered judgment on the jury verdict. The trial court denied Comerica's motion for judgment notwithstanding the verdict. This appeal ensued.

Defendant first argues that the trial court erred in submitting this case to the jury because the statute of limitations barred plaintiff's claims and the determination of whether the statute of limitations barred the case was for the trial court, not the jury. Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether the statute of limitations bars a plaintiff's claim is a question of law that this Court reviews de novo. *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002); *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). However, "the question of the governing date of accrual of a cause of action for statute of limitations purposes is a question of fact." *Flynn v McLouth Steel Corp*, 55 Mich App 669, 675; 223 NW2d 297 (1974); see *Baker v DEC Int'l*, 458 Mich 247; 580 NW2d 894 (1998); *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 254; 506 NW2d 562 (1993); see also *People v Artman*, 218 Mich App 236, 240-242; 553 NW2d 673 (1996); *People v Wright*, 161 Mich App 682, 685-686; 411 NW2d 826 (1987).

Defendant attempts to reconfigure plaintiff's claims as all constituting conversion and to then apply that statute of limitations to bar plaintiff's cause of action. We decline defendant's invitation to reclassify plaintiff's claims because this argument was not properly preserved for appeal, nor fully developed on appeal. *Schellenberg v Rochester, Michigan, Lodge No 2225 of the Ben & Protective Order of Elks of the USA*, 228 Mich App 20, 49; 577 NW2d 163 (1998). To the extent that defendant argues that the trial court erred in leaving to the jury the determination concerning the discovery of the cause, and thus whether the statute of limitations barred plaintiff's claim, because the facts were not in dispute, we disagree. Here, the facts were disputed with respect to when plaintiff should have known of the embezzlement and thus the trial

court properly left these issues to the jury. MCR 2.116(I)(3), (4); see *Baker, supra*; *Simmons, supra*; *Flynn, supra*.

Defendant also argues that plaintiff lacked standing to sue defendants on plaintiff's asserted claims, contending that plaintiff's claims belong to Renaissance and Westland corporations and any injury to plaintiff, as a shareholder, is merely derivative of injury to Van Dresser, who is not a real party in interest. Whether a party has standing to bring an action is a question of law subject to review de novo on appeal. *Crawford v Dep't of Civil Service*, 466 Mich 250, 255; 645 NW2d 6 (2002); *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

This case presents a novel situation that cannot be characterized as a shareholder suit because plaintiff is not suing in the capacity of a shareholder, nor is he seeking to recover monies expended on behalf of a corporation. Rather, the purpose for the suit is to afford plaintiff an opportunity to prove that he is entitled to recover expenses incurred in defending himself against Sanwa Bank's efforts to collect on a personal guarantee that plaintiff made against a loan to a corporation in which plaintiff had a shareholder interest. In order to prove his entitlement to compensation from defendant, plaintiff was required to demonstrate that defendant's activities caused him to become liable on the guarantee and thus necessitated expending monies to defend himself from collection efforts. These proofs addressed activities of a corporation of which plaintiff was a shareholder; however, they do not make this a shareholder action for which plaintiff lacks standing. Plaintiff personally paid the money and he alone has standing to seek reimbursement. We find defendant's argument without merit.

In a related issue, defendant maintains that plaintiff cannot recover because his injury is not separate and distinct from that of the bankrupt corporations. However, for the same reasons that plaintiff has standing, this action is separate and distinct from claims pursued by the corporations in bankruptcy. This action was one to gain reimbursement for money that plaintiff personally expended to defend himself from Sanwa Bank's efforts to collect on his personal guarantee of a loan.

Defendant next argues, in essence, that plaintiff failed to meet his burden of proof as to causation and thus the trial court improperly denied defendant's motions for directed verdict and judgment notwithstanding the verdict (JNOV). We disagree. We review de novo the trial court's decisions on a motion for a directed verdict and a motion for JNOV. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002); *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). In reviewing a trial court's grant or denial of a motion for directed verdict or motion for JNOV, this Court examines the testimony and all legitimate inferences that may be drawn in a light most favorable to the plaintiff and determines whether reasonable jurors could honestly have reached different conclusions. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

Proof of causation requires both cause in fact and proximate cause. *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001). A defendant's conduct will be considered a cause in fact of damages if the damages would not have occurred but for the at-fault conduct. *Id.* Proximate cause is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury. *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). It involves a determination that the connection between the wrongful conduct and the

injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable, *Lamp v Reynolds*, 249 Mich App 591, 599-600; 645 NW2d 311 (2002), and depends in part on foreseeability, *Haliw, supra*; *Babula v Robertson,* 212 Mich App 45, 53; 536 NW2d 834 (1995). There may be more than one proximate cause. *Hagerman v Gencorp Automotive*, 457 Mich 720, 729; 579 NW2d 347 (1998). When a number of factors contribute to producing an injury, one actor's negligence can still be a proximate cause if it was a substantial factor in bringing about the injury. *Id.* at 737.

Having reviewed the record and drawing all legitimate inferences in a light most favorable to plaintiff, we conclude that plaintiff presented sufficient evidence from which a reasonable jury could find causation. Although defendant highlighted evidence from which a jury could conclude that plaintiff's damages were caused by other factors, the record also included evidence that bankruptcy could have been forestalled and "we'd be alive today" if an extra million dollars of cash had been available. Plaintiff testified that the companies operated on a revolving line of credit and explained that they functioned on approximately $600,000 per day. In late 1990, "cash requirements were high and cash became scarce" and they needed the availability of up to a million dollars on a daily basis. Plaintiff testified that that he believed that the monies that Friley took were a material cause of the Van Dresser bankruptcy. Further, plaintiff presented evidence from which the jury could conclude that Brown assisted Friley in the embezzlement, thus linking the claim to Comerica. Although Friley testified that Brown had no involvement in his scheme, plaintiff presented evidence that Comerica, through Brown's actions, was involved, including that Brown's home address was used for the address of one of Friley's companies; an assistant vice-president at Comerica who had been the manager in charge of the office where Brown worked and was Brown's immediate supervisor testified that it would be suspicious for a customer to use his address to open an account without his permission and that had he known that Friley used Brown's address as the address for the trucking company, he "probably would have questioned it"; under bank policy, Brown should have been suspicious because Friley used that bank branch rather than one closer to his home or work; Friley was allowed to use counter checks, which the bank's policy states can be used when the customer forgets his checkbook or has not received a new supply of checks, such as when a person is moving; and further, Brown refused to testify, invoking the Fifth Amendment. See *Phillips v Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause"). Given this evidence, a reasonable jury could conclude that had Friley not embezzled the money with the assistance of Brown, and therefore Comerica, the cash necessary to keep the companies alive would have been available, and if bankruptcy were avoided, plaintiff may not have had to commence a suit concerning Sanwa's attempt to collect on the letter of credit. Even if this Court would have decided otherwise, we may not substitute our judgment for that of the jury. *Zander, supra*.

Defendant next argues that plaintiff failed to mitigate his alleged damages by failing to infuse his own money into the Van Dresser corporations, which broke any alleged causal chain and made the jury speculate about to what extent defendant played a part in causing those alleged damages. Defendant suggests that the trial court erred in submitting plaintiff's claims to the jury. We conclude that Comerica is entitled to no relief with respect to this claim.

"Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing." *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). A plaintiff has a duty to mitigate his or her loss. *Lawrence v Will Darrah & Associates, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994). It is the defendant's burden to prove that the plaintiff failed to mitigate. *Id.*

Here, plaintiff's testimony reveals that he was unaware of Friley's embezzlement until years after the companies entered into bankruptcy proceedings. Where mitigation of damages seeks to minimize the economic harm arising from wrongdoing, *Morris, supra*, it is difficult to see how this purpose is fulfilled when the alleged failure to mitigate occurred before the wrongdoing was recognized. Even if plaintiff were required to mitigate his damages under the circumstances of this case, it is reasonable to conclude that at the time, by choosing to not contribute his own money to the companies and by commencing action to avoid payment on the letter of credit, plaintiff was using "such means as are reasonable under the circumstances to avoid or minimize the damages." *Morris, supra* at 263 (citations omitted). Furthermore, none of the Michigan cases that Comerica cites is commensurate with the circumstances in the present case, and they are therefore distinguishable from the present case.[2] Moreover, at best, a fact question for the jury existed. Ordinarily, a jury determines whether a plaintiff acted reasonably in mitigating his damages because mitigation revolves around factual matters. See generally *Snell v UACC Midwest, Inc*, 194 Mich App 511, 517; 487 NW2d 772 (1992). Viewing the testimony and all legitimate inferences that may be drawn in a light most favorable to the plaintiff, reasonable jurors could honestly have reached different conclusions with regard to mitigation, *Zander, supra*, and thus the trial court did not err in denying directed verdict or JNOV.

Next, defendant argues, in essence, that the trial court erred in submitting the issue of the reasonableness of attorney fees to the jury and thus erred in denying defendant's motions for directed verdict and JNOV. We disagree.

The record reveals that plaintiff sought the damages that he allegedly sustained because of defendants' actions that led to the instant suit, which is different than the collection of attorney fees expended in prosecuting the instant suit. With respect to damages, plaintiff testified that he used lawyers in the firm of which he was formerly involved, "the Honigman firm," from the time he left until the present and he paid standard rates for legal services received from them, that there was nothing different in how he was billed and how he paid with respect to the Sanwa matter, that he incurred legal fees in the fight with Sanwa over the guarantee and the letter of credit, and that he paid "[a] hundred thousand dollars. Ninety-nine thousand two hundred and eighty-four dollars, or something like that." Given this testimony, the evidence in the record supports the jury's damage award.

Defendant also argues that it owed no duty, fiduciary or otherwise, to plaintiff, and thus the trial court erred in submitting plaintiff's claims to the jury. We disagree.

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[2] To the extent that defendant relies on a case from a federal district court in New York, this Court is not bound by that decision.

With respect to a fiduciary duty, this Court has explained that "[a] fiduciary relationship arises from 'the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another.'" *First Public Corp v Parfet*, 246 Mich App 182, 191; 631 NW2d 785 (2001), quoting *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 508; 536 NW2d 280 (1995). A person who is in a fiduciary relationship with another is under a duty to act for the benefit of the other person regarding matters within the scope of the relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999). "Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio, supra*. A fiduciary duty generally does not arise in the lender-borrower relationship. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998).

To the extent that defendant links the breach of fiduciary duty claim with the negligence claim, we note that although the existence of a legal duty in a negligence action is a question of law that this Court reviews de novo, *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14; 596 NW2d 620 (1999), where there are factual circumstances that give rise to a legal duty, a jury must decide the existence or nonexistence of those facts, *Aisner v Lafayette Towers*, 129 Mich App 642, 645; 341 NW2d 852 (1983). While the question of duty is ordinarily one of law that the court is to decide, where a determination of duty depends on factual findings, those findings must be found by the jury. *Holland v Liedel*, 197 Mich App 60, 65; 494 NW2d 772 (1992).

Here, plaintiff's theory of the case was that Friley, a former employee of the plaintiff's corporation, worked in concert with defendant Comerica through its employee, Brown, to embezzle monies from the Van Dresser corporations in which the plaintiff was a shareholder, and which in turn led to the corporations going bankrupt and thus plaintiff liable for loans to the corporations for which he was a personal guarantor. There was evidence that Brown was intimately involved and substantially assisted Friley's scheme from the beginning and that this occurred due to the negligence or other acts of the defendant, such as Brown's failure to enforce several of defendant's policies and procedures. Plaintiff had personal relations with defendant because one of defendant's vice-president's sought out and obtained plaintiff's business. Evidence showed that Friley was a fiduciary to plaintiff because of their close personal relationship and to the Van Dresser corporations because of his position as an officer and as a manager and that Comerica aided and abetted Friley in breaching those fiduciary duties. Under the unique circumstances of this case, and viewing the evidence in a light most favorable to plaintiff, the trial court did not err in allowing the jury to make the factual determinations leading to the determination that Comerica had a duty to Honigman. Disputed issues of fact and credibility assessments of witnesses are properly within the province of the jury to determine. *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 689; 607 NW2d 123 (1999); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Further, whether Comerica aided and abetted Friley in his breach of fiduciary duties depended on factual determinations. Where a person in a fiduciary relation to another violates his duty as fiduciary, a third person who participates in the violation of duty is liable to the beneficiary. *In re Goldman Estate*, 236 Mich App 517, 522; 601 NW2d 126 (1999). We conclude that the trial court did not err in denying summary disposition, directed verdict, and JNOV.

Finally,[3] defendant argues that the trial court erred in denying its motions for summary disposition, directed verdict, and JNOV because Brown did not knowingly aid Friley's embezzlement, and even if she did, she acted outside the scope of her authority and defendant has no respondeat superior liability for illegal or criminal acts of its employee. We find this claim without merit.

Courts have imposed liability on those who were not the actors, but were merely the masters of the actors because "a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment." *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 650-551; 649 NW2d 23 (2002) (citations omitted). However, "[a]n employer is not vicariously liable for acts committed by its employees outside the scope of employment, because the employee is not acting for the employer or under the employer's control." *Id.* "An employer is not liable if the employee's tortious act is committed while the employee is working for the employer but the act is outside his authority, 'as where he steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own.'" *Green v Shell Oil Co*, 181 Mich App 439, 446; 450 NW2d 50 (1989) (citations omitted). Whether the employee was acting within the scope of employment is generally a question for the trier of fact; however, summary disposition is appropriate "where it is apparent that the employee is acting to accomplish a purpose of his own." *Green, supra* at 447. This Court also has stated, after a review of Michigan cases, that "when an employee commits a minor crime, a jury question arises as to whether that employee was acting within the scope of his employment." *Bryant v Brannen*, 180 Mich App 87, 102-103; 446 NW2d 847 (1989).

In other terms, "[t]he law is well settled that a principal is responsible of the acts of its agents done within the scope of the agent's authority." *Dick Loehr's, Inc v Secretary of State*, 180 Mich App 165, 168; 446 NW2d 624 (1989). In the agency context, a principal may be held liable for the acts of his agent done not within the scope of his employment but within the scope of his authority. *McCann v Michigan*, 398 Mich 65, 72; 247 NW2d 521 (1976) (Kavanagh, C.J.). The principal is liable if the agent was aided in accomplishing the tort by the existence of the agency relationship. *Id.* at 71; *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351; 288 NW2d 424 (1979), both citing 1 Restatement Agency, 2d, § 219(2)(d), p 481. Cf. *Champion v Nation Wide Security, Inc*, 450 Mich 702, 704; 545 NW2d 596 (1996) (holding with respect to sexual harassment under Michigan's Civil Rights Act that "an employer is liable for such rapes where they are accomplished through the use of the supervisor's managerial powers").

Here, viewing the facts in a light most favorable to plaintiff, we conclude that the evidence presented a jury question. Clearly, Brown was an assistant manager at a Comerica bank branch and opening accounts and depositing checks was part of her job. Whether she actually engaged in criminal behavior was a question for the jury. For example, whether the use of her address on Friley's account was done with a criminal intent or merely to assist in the opening of an account is a factual determination. Brown's actions could be construed as an

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[3] To the extent that defendant raises a separate argument concerning the trial court's denial of its motions for summary disposition, directed verdict, and JNOV, we do not address this issue separately because those arguments have been addressed within the other issues presented on appeal.

attempt to accomplish her employer's purpose because, from the facts, one could conclude that she was simply attempting to assist a customer to open accounts and use the services of the bank. If the customer preferred counter checks and the same business could transpire at the customer's convenience, such acts are in furtherance of the employer's business, even if the use of counter checks could be considered suspicious. The case is complicated by Brown's invocation of her Fifth Amendment right not to testify at deposition. The question whether Brown was acting within the scope of her employment was properly presented to the trier of fact.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra